INDEX OF AUTHORITIES CITED

PAGE

Selective Service Regulations:

Section 1604.51 [32 C. F. R. § 1604.51] 6

Section 1604.52 (c) [32 C. F. R. § 1604.52 (c)] ... 6

Section 1624.2 [32 C. F. R. § 1624.2] 8

Universal Military Training and Service Act, 50 U. S. C. App. Sections 450, *et. seq.*:

Section 6 (h) [50 U. S. C. App. § 456 (h), 65 Stat. 53] 7

Section 10 (b) (3) [50 U. S. C. App. § 460 (b) (3), 65 Stat. 87] 5, 6

Supreme Court of the United States

OCTOBER TERM, 1955

No. 513

UNITED STATES OF AMERICA, *ex rel.*
JUSTIN K. MCCARTHY,

Petitioner,

v.

HAROLD H. COOK, Lt. Col., U. S. A., Commanding Officer, United States Air Force, Induction Center, Schuylkill Arsenal, Philadelphia, Pa., and ROBERT T. STEVENS, Secretary of the Army,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

MAY IT PLEASE THE COURT:

Before taking up point by point the contentions in respondent's brief which deserve comment petitioner believes that a preliminary statement is in order.

This reply brief is submitted in order to point out significant omissions by the respondent in the questions involved and many important facts necessary to a proper consideration and disposition of the

essential questions presented. It is also intended to correct respondent's misinterpretation of what was decided by the court below.

At the outset it is important that this Court not be misled by respondent's unjustified suggestion (Br. p. 8) that petitioner is merely attempting to avoid his selective service obligations. Petitioner's conduct throughout his dealings with his local board has simply been an assertion of the rights to which he was entitled under the law and an attempt to obtain redress for the high-handed denial of those rights by the local board. Because of his insistence upon adherence to the law he is now unjustly accused of being a violator of the law himself. Few injuries cut more keenly into the marrow of human feeling than injustice. Resistance against injustice is so deeply rooted in the heart of man that when his sense of justice is outraged his whole nature rises in revolt. And when injustice wears the cloak of righteousness or the mask of patriotism, it cuts like a dagger piercing to the very bone. It is indeed sad that respondent should find it appropriate to characterize petitioner's insistence upon due process of law as an unpatriotic attempt to avoid service. It would have been easy for petitioner to acquiesce in the illegality and serve his statutory period in the Armed Forces. He has chosen instead the more difficult and truly patriotic course and has risked his entire fortune and honor in the "small City of Bethlehem" (Br. p. 9) in the cause of resistance to illegality which has ultimately brought him to this Court.

Petitioner challenges the over-all implication which respondent seeks to make in its brief, that the local

board gave petitioner a deferment at any time after May 28, 1953. The postponements of induction that were given were not deferments. Nor were they acts of generosity, as respondent would lead the Court to believe. They were grudingly given on the orders of the State and National Directors of Selective Service as the result of the denials of petitioner's procedural rights by the local board. By using the device of postponement rather than granting petitioner the deferment to which he was entitled under the law, the board kept him in a state of disturbing uncertainty, subject at all times to the whim of the local board. This produced a state of mind that made successful study difficult. This condition was precisely what Congress intended to avoid for students by establishing the statutory deferment. The respondent attempts to obscure this obvious violation of the law by the euphemism of equating "postponement" under a I-A classification with the statutory "deferment." It is not a matter of "technical deferment classification." (Br. p. 13) But it is a matter of substantial statutory right which was denied. The error of the respondent's argument can be clearly demonstrated by this analogy:— For instance, the Act provides for the exemption of ministers of religion. The respondent would have the Court believe that the denial of the ministerial exemption accompanied by a postponement of induction is equivalent to the granting of the statutory exemption. The result of respondent's entire argument is not only to blur but utterly to eliminate from the Act the careful Congressional distinction among exemption, deferment and postponement.

1. The attention of the Court is invited to the questions presented, stated on page 2 of the re-

spondent's brief. The questions presented by the respondent omit entirely the vital question number II appearing on page 3 of the petition. This question inheres in this case and will abide until decided. It is unjust to petitioner to conclude erroneously that the second question is not involved in this case. The respondent has also unjustly omitted question number IV appearing on page 3 of the petition.

2. While there are no affirmative misstatements in the respondent's statement of facts beginning on page 3 and ending on page 8, there are vital and crucial omissions of important facts. In the event that petitioner's case is considered upon the basis of the facts stated by the respondent, then petitioner will be seriously injured. A full statement of the facts necessary to a proper disposition of the questions raised appears in the petition at page 5 to page 27, and the Court is requested to read carefully and consider all of the facts there stated. Unless the Court does this, it will be unable to see clearly how petitioner was mistreated by his local board and deprived of vital constitutional procedural rights. The Court, moreover, will not appreciate how the questions arose unless petitioner's statement of facts, rather than respondent's, is considered as the basis for the disposition of this petition.

All of the omissions of important facts in the respondent's brief constitute the basis for the erroneous conclusion which appears at page 13 of respondent's brief. There the respondent states: ". . . it [the local board] obligingly continued to postpone induction at petitioner's request to allow him ample time within which to graduate from law school and to pass

his bar examinations." We challenge the correctness of this statement for the reasons heretofore stated in the preliminary statement to this brief.

On page 8 of the brief, respondent states that petitioner ". . . now seeks, nevertheless, to avoid altogether the selective service obligations . . ." We challenge the correctness of this statement. Complete avoidance of service could not result from a decision in petitioner's favor on four of the six questions stated in the petition. It could result only in the event that the Court decides in petitioner's favor on questions III and IV, stated in the petition at page 3.

3. The respondent on pages 9 to 11 of its brief wholly fails to meet the issue and answer the argument made by petitioner under point I at pages 29 to 36 of the petition. A specious and factitious conclusion is reached. The respondent in its argument at this point in the brief cuts out completely the critical qualifying statutory language "each county or political subdivision corresponding thereto of each state . . ." The respondent would have this Court believe that "corresponding thereto" does not refer to a county but refers to any political subdivision, such as a city, town, irrigation district, poor district, sanitary district, school district or borough. The respondent cites cases supporting the obvious proposition that a city is a political subdivision. The citation of these cases is unnecessary to prove this familiar point. It is not in dispute in this case that a city is a political subdivision. What is in dispute and what has not been answered by the respondent is whether a city lying in *two* counties is a political subdivision "corresponding to *a* county" within the meaning of Section 10 (b) (3) of the Act.

In order to make its sophistry appear respectable, the respondent relies upon the section of the regulations defining the population limits of a local board area, a matter which is not here in issue (32 C. F. R. § 1604.51) (see pages 9-10, 20 of the brief). This regulation does not relate to a local board area situated in two counties but is limited to an area within one county. The respondent cannot discard the statutory phrase, "political subdivision corresponding thereto" and substitute therefor a misinterpretation of Section 1604.51. Neither this section of the regulations, nor any other, relates to or purports to authorize the establishment of one local board area comprising parts of two counties.

On page 10 of the brief, argument is made about the residential requirements of board members in 32 C. F. R. § 1604.52 (c). Since it is plain that the position taken by respondent on Section 10 (b) (3) of the Act on page 9 falls, then the related argument in respect to 32 C. F. R. § 1604.52 (c) on page 10 must fall for the same reason.

4. The respondent takes the position that the conflict of decisions regarding the superseding effect of an appeal board classification relied upon by petitioner at pages 36 to 39 (based on question number II in the petition at page 3 and omitted by the respondent) does not exist in this case. The holding made by the court below that produced this conflict was an alternative holding in this case which cannot be eliminated from it merely by the device of relegating it to a footnote in respondent's brief. The court below expressly held as follows: "The Area Appeal Board denied his appeal. Such action by the

Appeal Board amounted to a new classification. See *United States* v. *Stiles,* 3 Cir., 169 F. 2d 455." (Pet. p. 80)

5. It is wholly unnecessary for petitioner even to answer the argument of the respondent about the proper interpretation of Section 6 (h) of the Universal Military Training and Service Act. The argument made by the respondent in an attempt to persuade this Court to deny the petition in this case (pages 11-14) shows, now more than ever, that the petition ought to be granted in this case on this ground. From a reading of the discussion at pages 40 to 52 of the petition and the brief of the respondent at pages 10 to 13, it becomes manifest that the statute is plainly susceptible of two conflicting interpretations. Since such an important statute is thus ambiguous it is imperative that this Court grant the writ and properly interpret the statute so as to resolve the ambiguity.

Respondent's argument at page 13 of its brief to the effect that petitioner's postponement of induction was equivalent to a deferment within the meaning of the law (Section 6 (h) of the Act) has already been answered in the preliminary statement contained in this reply.

6. Petitioner challenges respondent's argument which appears at pages 14 to 16 of its brief concerning the denial of a personal appearance before the local board. Respondent's argument is based on the same misconception with which it has been plagued from the very beginning. This is that petitioner was in effect deferred because his induction was postponed long enough for him to complete his legal education. This is no answer to the outrageous denial of pro-

cedural rights and flouting of the law by the local board, which cannot be glossed over by the use of the epithet "frivolous." (Br. p. 14)

In footnote 9 which appears on pages 15 and 16 of the brief, respondent contends that the hearing granted the petitioner on May 17, 1954, was a personal appearance under 32 C. F. R. § 1624.2 rather than a preclassification hearing as petitioner has contended. The only basis for respondent's contention is its assumption that the local board so regarded the hearing. Even if this assumption were correct, the type of hearing which was conducted is not determined by the subjective feelings of the board members, and the hearing belatedly granted in this case did not cure the conceded denial of the personal appearance at a time when it was needed by petitioner and required by law.

CONCLUSION

For the reasons stated in this reply, and for those appearing in the petition, the writ of certiorari should be granted.

Respectfully submitted,

THOMAS D. MCBRIDE
2015 Land Title Building
Philadelphia 10, Pennsylvania

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Petitioner

December, 1955.

End